

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

v.

CF BUILDERS, INC.,

Respondent.

CASE NO. OSH 2010-32
Inspection No. 313079048

ORDER NO. 429

ORDER GRANTING DIRECTOR OF
LABOR'S MOTION TO DISMISS
APPEAL, FILED ON DECEMBER 29,
2010

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MOTION TO DISMISS APPEAL, FILED ON DECEMBER 29, 2010

On December 29, 2010, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant) filed a Motion to Dismiss Appeal with the Hawaii Labor Relations Board (Board) contending that the instant contest was untimely filed and the Board lacked jurisdiction over this appeal.

At the initial conference/settlement conference held on January 10, 2011, the Board set deadline for the submission of arguments in response to the Complainant's motion to dismiss as well as any motion Respondent sought to file regarding the Hawaii Occupational Safety and Health's (HIOSH) jurisdiction over Respondent who allegedly had no "employees." The deadline for Respondent to respond to Complainant Director of Labor's Motion to Dismiss Appeal, filed December 29, 2010, and for Respondent to file its own motion regarding HIOSH's jurisdiction over Respondent and whether Respondent is an "employer" of "employees" was February 23, 2011. The deadline for Complainant to respond to Respondent's motion regarding HIOSH's jurisdiction over Respondent and whether Respondent is an "employer" of "employees" was March 9, 2011.

The Board conducted a hearing by conference call on Complainant's Motion to Dismiss Appeal on March 16, 2011. Complainant's counsel appeared before the Board and Respondent's representative participated by telephone. After careful consideration of the arguments, pleadings, and record in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting Director of Labor's Motion to Dismiss Appeal, for the reasons discussed below.

FINDINGS OF FACT

1. On March 24, 2010, HIOSH inspector Charles Clark (Clark) initiated a comprehensive inspection of Respondent's workplace located at 95 Kane Street, Kahului, Hawaii 96732, Inspection number 313079048. Respondent was in the construction (framing) business.
2. As a result of the inspection, on August 11, 2010, Complainant issued a Citation and Notification of Penalty (Citation) to Respondent alleging violations of the occupational safety and health standards and imposing penalties of \$2,250.00. HIOSH issued the following citations to Respondent:

Citation 1, Item 1a: Serious [\$375.00 penalty assigned]

29 CFR 1910.178(a)(4) [Refer to chapter 12-73.1, (Hawaii Administrative Rules) HAR] was violated because:

Holes were burned on both tines of a Skytrac forklift.

29 CFR 1910.178(a)(4) states "Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly."

Citation 1, Item 1b: Serious [No penalty assigned]

29 CFR 1910.178(l)(1)(ii) [Refer to chapter 12-73.1, HAR] was violated because:

The operator of a SkyTrac forklift had not completed the required training.

29 CFR 1910.178(l)(1)(ii) states "Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5)."

Citation 1, Item 1c: Serious [No penalty assigned]

29 CFR 1910.178(q)(7) [Refer to chapter 12-73.1, HAR] was violated because:

The horn on a Skytrac forklift was not operable.

29 CFR 1910.178(q)(7) states “Industrial trucks shall be examined before being placed in service, and shall not be placed in service if the examination shows any condition adversely affecting the safety of the vehicle. Such examination shall be made at least daily. Where industrial trucks are used on a round-the-clock basis, they shall be examined after each shift. Defects when found shall be immediately reported and corrected.”

Citation 1, Item 2: Serious [\$375.00 penalty assigned]

29 CFR 1926.501(b)(13) [Refer to chapter 12-121.2, HAR] was violated because:

An employee exposed to a fall of 19 feet to the lower level was not protected from the fall hazard by any means of conventional fall protection.

29 CFR 1926.501(b)(13) states “Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502. There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.”

Citation 1, Item 3: Serious [\$375.00 penalty assigned]

29 CFR 1926.501(b)(14) [Refer to chapter 12-121.2, HAR] was violated because:

Eleven window wall openings that measured 33 inches above the floor were not properly protected to prevent fall hazards.

29 CFR 1926.501(b)(14) states “Wall openings. Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.”

Citation 1, Item 4a: Serious [\$375.00 penalty assigned]

29 CFR 1926.502(i)(3) [Refer to chapter 12-121.2, HAR] was violated because:

A 16" x 12" floor opening had a cover that was not secured to prevent displacement.

29 CFR 1926.502(i)(3) states “All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.”

Citation 1, Item 4a: Serious [No penalty assigned]

29 CFR 1926.502(i)(4) [Refer to chapter 12-121.2, HAR] was violated because:

A 12" by 16" floor opening cover was not color coded or marked with the word “HOLE” or “COVER”.

29 CFR 1926.502(i)(4) states “All covers shall be color coded or shall be marked with the word “HOLE” or “COVER” to provide warning of the hazard.

Citation 1, Item 5a Serious [\$375.00 penalty assigned]

29 CFR 1926.451(c)(2)(v) [Refer to chapter 12-130.1, HAR] was violated because:

A forklift work platform used to install the exterior siding was not attached to the forklift tines.

29 CFR 1926.451(c)(2)(v) states “Fork-lifts shall not be used to support scaffold platforms unless the entire platform is attached to the fork and the fork-lift is not moved horizontally while the platform is occupied.”

Citation 1, Item 5b: Serious [No penalty assigned]

29 CFR 1926.451(g)(1)(vii) [Refer to chapter 12-121.2, HAR] was violated because:

A forklift work platform was not provided with guardrail systems on the front & end sections.

29 CFR 1926.451(g)(1)(vii) states “For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.”

Citation 1, Item 6: Serious [\$375.00 penalty assigned]

29 CFR 1926.404(f)(6) [Refer to chapter 12-141.1, HAR] was violated because:

A 3 wire orange flexible extension cord and a 3 wire blue flexible extension cord were both missing the ground pins on the attachment plugs.

29 CFR 1926.404(f)(6) states “Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.”

Citation 2, Item 1: Other [No penalty assigned]

29 CFR 1926.25(a) [Refer to chapter 12-115.1, HAR] was violated because:

Scattered scrap lumber and other miscellaneous debris presented a trip & fall hazard.

29 CFR 1926.25(a) states “During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.”

Citation 2, Item 2: Other [No penalty assigned]

29 CFR 1926.403(b)(2) [Refer to chapter 12-141.2, HAR] was violated because:

A 3 wire metal fourplex outlet box hard wired with a power cord was not being used according to the listing, labeling, or certification.

29 CFR 1926.403(b)(2) states “Installation and use. Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification.”

3. The Citation was sent by certified mail via the United States Postal Service on August 11, 2010 with return receipt requested to Respondent’s listed mailing address of 206 Luakaha Circle, Kihei, Hawaii 96753. On September 7, 2010, Respondent’s representative Clinton Fleming (Fleming) informed HIOSH by telephone that he had moved to Medford, Oregon, and that his new mailing address was 612 S. Ivy Street, Medford, Oregon, 97501-3517. He also informed HIOSH that he had not received the HIOSH Citation.
4. According to the signed return receipt, the Citation was received by Respondent in Medford, Oregon on September 27, 2010. Director of Labor’s Motion to Dismiss Appeal, Exhibit C.
5. The Citation informed Respondent of its right to contest, providing in relevant part:

Employers' Right to Contest – You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency.** Once a letter of contest is received, it becomes the jurisdiction of the [Board]. (Emphases original).

6. By letter dated October 20, 2010, Respondent contested the Citation. The envelope containing the letter of contest was postmarked on October 20, 2010.
7. The Board finds that the Citation resulting from Inspection number 313079048 was issued by HIOSH on August 11, 2010, and sent via certified mail to Respondent's business address; and the Citation was received by Respondent on September 27, 2010. The deadline for Respondent to have properly contested the Citation and Notification of Penalty was October 17, 2010. Since October 17, 2010 fell on a Sunday, the deadline is extended to the next business day, or October 18, 2010. However, Respondent did not contest the Citation until the letter, dated and post-marked, on October 20, 2010.
8. Respondent's contest of the Citation is untimely,¹ and therefore the Board lacks jurisdiction over the appeal. At the hearing on the Director's Motion to Dismiss Appeal, Respondent argued that it was not an "employer" of "employees" within the meaning of the HIOSH regulations because the company is a sole proprietorship with no employees. However, the Board is unable to consider Respondent's arguments since it lacks jurisdiction over the contest.

¹See Micro Lapping & Grinding Co. v. Unemployment Comp. Bd. of Review, 486 N.E.2d 225, 227 (Ohio Ct. App. 1984) ("The requirement that a mailed application to institute a further appeal be 'postmarked' prior to the running of the appeal time, has been limited to a post office postmark.").

CONCLUSIONS OF LAW

1. The Board has jurisdiction over appeals from HIOSH citations pursuant to Hawaii Revised Statutes (HRS) §§ 396-3 and 396-11.
2. The Hawaii Supreme Court has held that the right of appeal is purely statutory, and therefore the right of appeal is limited as provided by the legislature and compliance with the method and procedure prescribed by it is mandatory. In re tax appeal of Lower Mapunapuna Tenants Assn., 73 Haw. 63, 69, 828 P.2d 263, 266 (1992).
3. In Si-Nor, Inc. v. Director, Dept. of Labor and Indus. Relations, 120 Hawai'i 135, 145, 202 P.3d 596, 606 (2009), the Hawaii Intermediate Court of Appeals cited with approval the following quote from Love v. College Level Assessment Services, Inc., 928 S.W.2d 36, 38 (Tenn. 1996):

[T]he timely perfecting of an appeal is no mere technical formality: it is in fact a mandatory requirement, and if it is not complied with, the court has no jurisdiction over the case.

4. To the extent the failure to timely perfect an appeal divests an appellate body of jurisdiction, such failure cannot be waived by the parties or the appellate body. See State v. Johnston, 62 Haw. 9, 619 P.2d 1076 (1980) (“A jurisdictional defect in an appeal cannot be waived by the parties or disregarded by us.”).
5. Similarly, HRS 396-11, provides in relevant part:
 - (a) Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.
6. HAR § 12-51-19, governing employer contests of citations, provides (emphasis added):

Employer contests of citation, proposed penalty or both. Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board

within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. The department will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each petition shall be posted where they shall be readily observed by all affected employees.

7. The Citation resulting from Inspection number 3134079048 was issued by HIOSH on August 11, 2010, and sent via certified mail to Respondent's business address; and the Citation was received by Respondent's representative, on September 27, 2010. The deadline for Respondent to have properly contested the Citation was twenty days thereafter or October 17, 2010. Since October 17, 2010 was a Sunday, the deadline for the contest would be the next business day or October 18, 2010. However, Respondent did not contest the Citation until the letter dated and post-marked on October 20, 2010. The Board concludes that the instant contest is untimely.
8. Respondent's contest of the Citation and Notification of Penalty is untimely, and therefore the Board lacks jurisdiction over this appeal.

ORDER

For the reasons discussed above, the Board hereby grants the Director of Labor's Motion to Dismiss Appeal, filed on December 29, 2010.

DATED: Honolulu, Hawaii, April 15, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

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SARAH R. HIRAKAMI, Member


NORMAN K. KATO II, Member

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